# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| A. The Board's findings of fact | 2 |
| 1. Background | 2 |
| 2. The Group's refusal to meet with the Union unless the strikers return; the Union's strike against petitioner | 4 |
| 3. The agreement between the Group and the Union, and the Union's attempts to obtain a contract with petitioner based thereon | 5 |
| 4. Petitioner's repudiation of the entire Group agreement; the fruitlessness of further negotiations | 7 |
| 5. Petitioner's withdrawal of recognition from the Union; its unresponsiveness to the strikers' applications for reinstatement | 10 |
| B. The Board's decision and order | 12 |
| C. The decision of the court of appeals | 14 |
| Argument | 14 |
| Conclusion | 21 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Diaz* v. *United States*, 223 U.S. 442 | 19 |
| *National Labor Relations Board* v. *Cement Masons Local No. 555*, 225 F. 2d 168 | 18 |
| *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, certiorari denied, 347 U.S. 953 | 18 |
| *United Mine Workers* v. *Patton*, 211 F. 2d 742 | 18 |
| *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 | 17 |




655488—62——1

Statute:
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*): Page
Section 8(a)(1), (3), and (5) ..... 12, 13
Miscellaneous:
1 Wigmore, *Evidence*, § 18, pp. 321–325 (3d ed. 1940) ..... 19

# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 290

RICE LAKE CREAMERY COMPANY, PETITIONER

*v.*

GENERAL DRIVERS & HELPERS UNION, LOCAL NO. 662, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AND NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–7a) is reported at 302 F. 2d 908. The Decision and Order of the National Labor Relations Board (J.A. 4–85) [1] are reported at 131 NLRB 1270.

### JURISDICTION

The judgment of the court of appeals was entered on May 3, 1962 (Pet. App. 8a–9a). The petition for

[1] "J.A." references are to the joint appendix in the Court below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

a writ of certiorari was filed on July 31, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board deprived petitioner of due process of law by finding unfair labor practices which allegedly were not set forth in the complaint or litigated at the hearing.

2. Whether substantial evidence on the record considered as a whole supports the Board's finding, affirmed by the court below, that (a) a strike at petitioner's plant was caused and prolonged by petitioner's unfair labor practices; and (b) petitioner declined to reinstate the strikers after they made a bona fide request to return to their former jobs.

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), are set forth in the petition (Appendix III, 10a–11a).

## STATEMENT

### A. THE BOARD'S FINDINGS OF FACT

#### 1. BACKGROUND

In May 1952, the Board certified the Union [2] as the exclusive bargaining representative of a unit consisting of petitioner's production and maintenance em-

[2] General Drivers and Helpers Union, Local 662, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

ployees and driver-salesmen (J.A. 13; 100–102). Thereafter, petitioner and the Union entered into a series of collective bargaining agreements, the last of which expired on May 31, 1958 (J.A. 13; 111).

About March 24, 1958,[4] the Union served notice on petitioner of its desire to negotiate a new collective bargaining agreement to supplant the current contract (J.A. 14; 112, 500). At the same time, the Union served similar notices on 15 other dairies within the area of its jurisdiction (J.A. 15; 112–113). These dairies and petitioner are referred to collectively as "the Group." On April 14, the Union sent identical letters and identical contract proposals to each employer in the Group, asking it to enter into "joint negotiations" directed toward the execution of a new contract (J.A. 15; 104–105, 108, 114, 423–445, 501).

When petitioner received the request and the proposal, its president, Ervin Gerland, turned them over to William A. Cameron, its attorney, advising him that petitioner would participate in the joint negotiations (J.A. 15; 373–374, 502). By letters dated April 23 and May 7, Group Attorney Mandt Torrison advised the Union that all employers in the Group, including petitioner, had agreed to appoint a committee of four representatives, including Torrison, to engage in joint negotiations with the Union (J.A. 15, 17; 115–116, 503–505). Enclosed with the May 7 letter were copies of the Group's contract proposals (J.A. 17; 108, 116, 445–458).

---

[3] Petitioner, a Wisconsin corporation, operates a plant which processes milk into butter, ice cream, and other dairy products (J.A. 12).

[4] All events herein occurred in 1958 unless otherwise stated.

Between May 8 and June 19, the Union and the Group Committee held a number of negotiating sessions, but failed to reach an agreement (J.A. 17–23; 117–125, 221–224, 239–247, 258–261, 272–274, 282–286, 341–344). On June 19, after the Group Committee advised the Union that it had nothing further to discuss, the Union called a strike at the plant operated by one member of the Group, Turtle Lake Cooperative Creamery, and on the following day it struck another member of the Group, Farmer's Cooperative Dairy, at Clear Lake (J.A. 23; 183–185). These strikes were part of a Union plan to strike all plants of the Group, one by one, in order to build up pressure to reach an agreement (J.A. 54; 183–186).

2. THE GROUP'S REFUSAL TO MEET WITH THE UNION UNLESS THE STRIKERS RETURN; THE UNION'S STRIKE AGAINST PETITIONER

At about midnight on the evening of Friday, June 20, the Group Committee advised Union Representative Veleke that it would talk further with the Union if the strikers would return to work (J.A. 23; 185, 188). Veleke replied that the Union was happy to talk further, but the strikers refused to go back to work (J.A. 23; 185). Accordingly, the Group Committee did not meet with the Union at that time.

On the following day, June 21, the Union called a strike at a member dairy in Baldwin, Wisconsin (J.A. 23; 125, 186). On the same day, Veleke and Union Representative Mueller drove to petitioner's plant in Rice Lake, Wisconsin (J.A. 23; 126, 224). They asked Company Attorney Cameron to "settle this thing * * * right now by negotiating a contract", in-

dividually (J.A. 23, 25; 226, 127, 293). Cameron replied that the Company was being represented by Torrison in the joint negotiations and was committed to abide by any agreement made by Torrison and the Group Committee (J.A. 25; 127, 224–225, 226, 292–293, 308). Company President Ervin Gerland, who was present, confirmed this statement (J.A. 25; 293). Cameron added that "this would probably be settled" in a few days, and that "we can sweat it out for a couple of days" (J.A. 25; 129, 190, 249). While this conversation was taking place, petitioner posted a notice on the plant bulletin board (J.A. 24–25; 102, 128, 225, 403) which stated that petitioner intended "to operate the plant regardless of any action the Union may take," "urged" the employees to continue working, and warned that "In the event the Union strikes the plant any employee not reporting for work will be considered on strike and will be replaced."

On Veleke's instructions, petitioner's employees went on strike at the beginning of the day shift on the following morning, Sunday, June 22 (J.A. 26; 262).

3. THE AGREEMENT BETWEEN THE GROUP AND THE UNION, AND THE UNION'S ATTEMPTS TO OBTAIN A CONTRACT WITH PETITIONER BASED THEREON

Because of the pressure exerted by the strikes described above, several members of the Group decided to resume negotiations with the Union, and, at an all-night bargaining session beginning on June 24, the Union and the Group Committee reached an agreement (J.A. 26–28; 131–137, 190–194, 241, 347–353). The State mediator advised Company Attorney Cameron of the terms of the settlement, and arranged a

meeting between the Union and petitioner on the afternoon of June 25 to consummate a contract with petitioner (J.A. 28; 139, 192–193).[5]

At the June 25 meeting, the Union asked petitioner whether the agreement just reached with the Group Committee was also an agreement with petitioner (J.A. 29; 140). Petitioner replied that it would accept that agreement if the Union would agree to substitute certain provisions from the recently expired contract between petitioner and the Union, including those providing for a modified rather than a full union shop,[6] separate seniority for driver-salesmen, and job classifications[7] (J.A. 29; 140–142, 203–204). The Union membership rejected this proposal, primarily because they wanted a full union shop in order to elim-

[5] Cameron and petitioner's President Gerland had been present at the outset of the June 24 Group Committee negotiations, but left when the bargaining actually got under way (J.A. 28). The Group Committee, although authorized to discuss and negotiate an area contract, had no authority finally to commit petitioner and other members of the Group without their subsequent ratification (J.A. 16–17; 335–337, 527–530).

[6] The modified union shop did not require union membership of presently employed employees who had never joined the Union (J.A. 405–406, 108).

[7] Some of petitioner's employees were in a lower job classification, and accordingly received lower wages, than if they had performed the same job for the other members of the Group. Petitioner's assertion that, during the June 25 negotiations, "the Union rejected the area agreement on wages negotiated just that morning and made wage demands on Petitioner that would have provided an increase over and above those provided for in the area agreement" (Pet. 21), merely relates to the Union's efforts to conform petitioner's job classification system to that of other members of the Group (J.A. 65–66; 141–142, 197–207, 343).

inate favoritism which, they thought, petitioner was evincing in favor of nonmembers (J.A. 29–30; 142–145, 204, 250, 254, 265–266, 294–295).

On July 8, petitioner submitted a contract proposal including, *inter alia*, a "modified union shop" clause which omitted a provision in the expired contract that petitioner would recommend union membership to nonmembers (J.A. 32; 146–153, 208–211, 507). The membership rejected this proposal because they felt that it provided inadequate protection against preference to nonmembers (J.A. 33; 153–154, 213–214). However, on July 9 Union Representative Veleke told petitioner that he might be able to "sell" that proposal, and "wind the thing up," if petitioner would recommend to three of the six nonunion employees that they join the Union (J.A. 33; 157, 216). Later that day, petitioner, without explanation, advised the Union that it had withdrawn "the offer to execute the contract we have discussed yesterday" (J.A. 33, 63; 157–158).

4. PETITIONER'S REPUDIATION OF THE ENTIRE GROUP AGREEMENT; THE FRUITLESSNESS OF FURTHER NEGOTIATIONS

Finally, on July 25, petitioner informed the Union that it would not go along with the Group agreement (J.A. 34–35; 158–159). The Union and Company Attorney Cameron then worked out a tentative agreement which was essentially the same as the one which petitioner had proposed on June 25 and the employees had rejected (J.A. 35–36; 162–166, 231–232, 333–334, 370–371, 509–513). However, instead of the "modified union shop" provisions in petition-

er's earlier proposal and in the expired contract, the tentative agreement contained a union-security clause which required union membership only of employees who executed checkoff cards, and a clause which, although prohibiting employer discrimination based on union membership or nonmembership, did not contain a provision previously sought by the Union for back pay to employees so discriminated against (J.A. 32, 35–36; 148–150, 163, 165–166, 208–209, 212, 333–334, 370–371, 507, 509–512).

The Union membership accepted this tentative agreement (J.A. 36; 165, 232–233). Company Attorney Cameron told petitioner's top management that the agreement was "better than anything [he] had hoped to get," and recommended that they accept it (J.A. 37; 361). However, on July 26, the Gerlands turned it down without explanation (J.A. 37; 361–362). Moreover, later that day, they advised the Union that they considered some of the striking employees, including Union Steward DeBoer, as "undesirable," and one of them observed that he "didn't see any reason they should take any of the workers back because the crew that they had now hired was perfectly satisfactory" (J.A. 37–38; 235).

The last meeting of the parties was held on August 28 (J.A. 38; 252, 274). The Union asked whether petitioner's last offer of July 25 was still in effect (J.A. 38; 274). Company Attorney Cameron replied that there was no pending proposal from petitioner, as it had withdrawn any proposal made at that meeting, and that if the parties were to arrive at any agreement it would "have to be worked out from

scratch" (J.A. 38; 253). The Union asked what variations from the July 25 proposal petitioner wanted (*ibid.*). Cameron conceded that the "economics of the contract" presented no problem, but stated that any agreement reached would have to exclude union security, checkoff, and any seniority, "maintenance of standards," and "protection-of-rights" and "successorship" clauses,* and must include a management prerogative clause giving petitioner the sole right to interpret and "execute" the contract (J.A. 38; 253–254, 266–267, 274, 276–277). Cameron conceded that he felt the Union would not be interested in this proposal (J.A. 38; 254, 267–268, 277). The Union took the position that all strikers must be taken back without loss of seniority, even though petitioner might thereby be compelled to release the employees who had been hired to fill the strikers' jobs (J.A. 38–39; 266–268, 364). Cameron said that the striking employees were "all impudent" and were not entitled to come back, for personal reasons and because they did not "appreciate" the Gerlands; that petitioner might take back four to six strikers without seniority to fill any jobs available, but that these strikers would have to reapply at the plant for employment; and that the Company was not interested in the rest of the strikers, who had worked for petitioner for as long as 19 years (J.A. 39; 130–131, 254, 267–268, 506). Cameron also told Steward Harry DeBoer, who had been petitioner's maintenance man for 13 years but had acted as employee spokesman in

* The previous contract had covered all of these subjects (J.A. 405–422).

seeking to induce Cameron to accede to a union shop, that his job had been abolished at the beginning of the strike (J.A. 39; 254–255, 275, 290–291, 294–297).

"Working from scratch," as Cameron demanded, the Union produced the original proposal which it had submitted to the Group five months earlier (J.A. 39; 255, 274). The parties went over it, clause by clause, with little or no discussion of each clause. As each clause was read, Cameron would merely say whether petitioner accepted it or rejected it (J.A. 39; 255–256, 268, 276, 363). Petitioner accepted seven of the 19 clauses covered—all of which were noncontroversial and substantially like those in the expired contract—and rejected the others (J.A. 39; 256–257).

5. PETITIONER'S WITHDRAWAL OF RECOGNITION FROM THE UNION; ITS UNRESPONSIVENESS TO THE STRIKERS' APPLICATIONS FOR REINSTATEMENT

About two weeks later, on September 10, petitioner cancelled a bargaining meeting set for the following day, and sent the Union a letter declining to bargain with it, on the ground that it no longer represented a majority of the employees (J.A. 40; 166–167, 512–513).

On December 2, most of the striking employees went to the plant in a body. A committee, headed by Union Steward DeBoer, went in to see Secretary-Treasurer Loretta Gerland and stated that the strikers were at the plant to apply for their jobs and to go back to work as a group; that all of them were available for work at once (J.A. 40; 298–299). Miss Gerland replied that she had nothing to do with hiring male employees; that they would have to see President

Ervin Gerland, who was in the hospital, or Vice President Harry Gerland, who was out of town; and that the strikers would hear from petitioner later (J.A. 40; 299, 318). She noted the names of the committee and, looking outside the door, acknowledged the presence of the other strikers (J.A. 40–41; 299–300).

By letter postmarked December 8, Company Attorney Cameron advised Union Steward DeBoer that Cameron and President Ervin Gerland were "handling the matter for the creamery" and that neither was available at that time (J.A. 41; 300, 513–514). Cameron stated, "If any of the former employees wish to make application" they should apply to Harry or Ervin Gerland, and "their application will be given consideration when and if jobs for which they are qualified are available" (J.A. 41; 300, 514). Cameron also inquired (1) whether the application meant that the strike had terminated and the picket lines would be removed; and (2) whether "this [was] an offer by each of the individual former employees to return to work, or * * * would [they] return to work only if all of them were re-employed" (*ibid.*).

By letter of December 19, DeBoer referred Cameron to the Union for information as to the status of the strike and the picket line (J.A. 41–42; 301, 515). DeBoer added, however, that "the employees are willing to return to work" pending disposition of the unfair labor practice charges (J.A. 42; 301, 515). DeBoer further stated (J.A. 42; 304, 515–516):

> We made our position clear at the time of the application, and we restate at this time that all of the employees, individually and collectively,

> who are currently on strike, have applied to return to work. This application was made unconditionally and its unconditional offer still stands. In other words, Mr. Cameron, there are no "only if's" involved in this request.
>
> We wish to reassert at this time that we consider our original unconditional application made on December 2, 1958, to be an effective offer to return to work. However, if you wish to add any additional or further requirements or insist that the employees reapply, please consider this letter such re-application, without waiver of our position that our original application was legally effective. This letter is being written on my behalf and on behalf of all the other striking employees. [Emphasis in original.]

Petitioner never answered this letter or recalled any of the strikers (J.A. 42; 301, 317–318, 383–384, 531).

### B. THE BOARD'S DECISION AND ORDER

The Board found, in agreement with the Trial Examiner, that petitioner violated Section 8(a) (5) and (1) of the Act by failing to bargain with the Union in good faith on and after June 20, (J.A. 53–55, 62–69). The Board relied, *inter alia*, on (1) petitioner's refusal (through the Group Committee) to meet with the Union until it ended the Turtle Lake strike (J.A. 53); (2) petitioner's withdrawal of its July 8 offer despite the Union's indication that the offer might be acceptable if petitioner would only agree, as it had in the expired contract, to recommend to three nonmembers in the unit that they join the Union (J.A. 62–66); (3) petitioner's unqualified rejection of the

July 25 tentative agreement, even though the Union's acceptance thereof meant that it had accepted, as a settlement of the last major point of disagreement between the parties (*i.e.*, the union security issue), even less than it had received under the expired contract (J.A. 67–68); and (4) petitioner's insistence, in the last bargaining meeting, on starting "from scratch" and omitting certain basic provisions in the prior contract (J.A. 68–69).

The Board found that this unlawful Company conduct, which "continually prevented the Union from securing a signed agreement," caused and prolonged the strike among petitioner's employees, which commenced on June 22 (J.A. 54–55, 69–70). The Board accordingly concluded that the strikers were unfair labor practice strikers and, as such, retained their status in the unit, and their right to reinstatement, even though their jobs may have been filled (J.A. 70). It found, therefore, that petitioner further violated Section 8(a) (5) and (1) by withdrawing recognition from the Union on the ground that the strike replacements had caused the Union to lose its majority status (J.A. 70), and violated Section 8(a) (3) and (1) by refusing to reinstate the strikers upon their application (J.A. 75–76). In addition, the Board found that petitioner violated Section 8(a)(1) of the Act by stating, at the August meeting, that it would consider taking back only a few of the strikers, and those only as new employees (J.A. 69, 55–56); and violated Section 8(a) (3) and (1) by terminating the job of Union Steward DeBoer because of his Union and concerted activities (J.A. 71–74).

The Board's order (J.A. 5–11), *inter alia*, requires petitioner to cease and desist from the unfair labor practices found, to offer reinstatement to the strikers unlawfully discriminated against and compensate them for loss of pay, to bargain with the Union upon request, and to post appropriate notices.

### C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order (Pet. App. 2a–7a). The court sustained the Board's findings that petitioner's refusal, through the Group Committee, to meet with the Union unless and until it ended the Turtle Lake strike was an unlawful refusal to bargain and one of the causes of the ensuing strike of petitioner's employees (Pet. App. 3a–5a). Accordingly, the court agreed that the strike was an unfair labor practice strike from its inception (Pet. 5a–6a). The court also affirmed the Board's finding that, after the strike began, petitioner further refused to bargain and committed other unfair labor practices which prolonged the strike (Pet. App. 6a). Finally, the court rejected petitioner's contention that it was "surprised" and therefore denied due process of law by the Board's action in finding that the June 20 refusal at Turtle Lake was an unfair labor practice (Pet. App. 6a–7a).

## ARGUMENT

1. There is no merit to petitioner's contention (Pet. 15–18) that the refusal of the Group Committee (which represented petitioner at that time) on June 20 to resume negotiations with the Union, except on

condition that the striking Turtle Lake employees return to work, was a matter neither comprehended by the complaint nor litigated at the hearing. The complaint issued by the Board (J.A. 393) alleged that:

> "Beginning on or about May 8, 1958, and at all times thereafter, the Respondent has failed and refused, and continues to fail and refuse, to bargain collectively with the Union as the exclusive collective bargaining representative of all the employees of the Unit, in that *inter alia* it: a. Entered into negotiations with the Union on or about May 8, 1958, with a fixed intention and determination not to arrive at a collective bargaining agreement, and throughout the course of subsequent negotiations engaged in conduct calculated to accomplish that result."

As the court below correctly concluded (Pet. App. 7a), "The incident at Turtle Lake on June 20 was conduct calculated to accomplish that result and was therefore within the scope of the complaint. The Board was not obliged to plead its evidence."[9]

[9] Petitioner suggests (Pet. 12–13) that the Board dismissed this portion of the complaint (Paragraph 10(a)) insofar "as it related to multiemployer bargaining." We submit that a careful reading of the Trial Examiner's Intermediate Report, which the Board adopted, shows that Paragraph 10(a) was dismissed only with respect to the allegations that petitioner failed to make clear to the Union the exact scope of the Group Committee's authority to bargain on its behalf and that the Group Committee engaged in bad faith bargaining on or before June 19; the paragraph was sustained, however, with respect to the Group Committee's refusal to meet between June 20 and June 24 (J.A. 51–55).

Moreover, contrary to petitioner's contention (Pet. 11–12; 18), a statement at the hearing itself confirmed that the negotiations at Turtle Lake would be a significant element in the Board's case. At the conclusion of his case-in-chief, counsel for the General Counsel asserted that among the causes of the strike at petitioner's plant was the refusal to bargain at Turtle Lake (J.A. 319–321). Although he gave the date as June 19 (when negotiations first broke off), rather than June 20 (when the Group Committee conditioned a resumption of negotiations on return of the strikers), this was sufficient to apprise petitioner that the entire period of the Turtle Lake break-down in negotiations, which lasted from June 19 to June 24 (see J.A. 22–23, 26–27, 53–55; 183–186), was in issue. In these circumstances, petitioner has no valid basis for its contention that it was "surprised" by the Board's finding that the Group Committee's conduct on June 20 was a refusal to bargain and was one of the causes of the subsequent strike at petitioner's plant.[10]

[10] Although a finding that there was a refusal to bargain on June 20 is an essential predicate for the Board's finding that the strike at petitioner's plant on June 22 was caused by unfair labor practices, it does not follow, as petitioner contends (Pet. 15–16), that the Board's order could not be sustained absent the June 20 finding. A strike which is economic at its inception may be prolonged and thus converted into an unfair labor practice strike by subsequent unfair labor practices. The Board found that, on and after July 9, petitioner engaged in further unfair labor practices (apparently not challenged here) which had the effect of prolonging the strike (p. 13, *supra*), and this finding was sustained by the court below (p. 14, *supra*). Petitioner's assumption that the Union

2. Petitioner's further contention (Pet. 18–26) that the record does not support the Board's findings, approved by the court of appeals, that petitioner was answerable for the refusal to bargain on June 20, and that such refusal was a cause of the strike at its plant, presents only an evidentiary issue which does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. In any event, the Board's findings are fully supported by the evidence.

(a) That the Group Commitee represented petitioner in the negotiations, at least up through June 20, is shown, *inter alia*, by these facts: When petitioner received the Union's request for joint negotiations, it told its attorney (Cameron) that it would participate in such negotiations, and this decision was in turn communicated to Group Attorney Torrison and the Union (p. 3, *supra*). When the Union sought to bargain individually with petitioner on June 21, the day after the Group Committee's unlawful refusal to bargain at Turtle Lake, petitioner replied that it was being represented by Torrison in the joint negotiations, and was committed to abide by the agreement concluded by Torrison and the Group Committee (pp. 4–5, *supra*). And, on June 25, when the Union asked petitioner to accept the agreement which the Group Committee had arrived at the preceding night, petitioner indicated its acceptance, subject to certain modifications, and fur-

had lost its majority by July 9 (Pet. 16) rests on sheer speculation, the Board having had no occasion to inquire into or make any finding on that issue.

ther negotiations commenced on that basis (p. 6, *supra*).

Nor is a different conclusion required by the fact that the authority of the Group Committee was circumscribed, in that any agreement which it reached with the Union was not binding on petitioner until ratified, while certain issues were reserved altogether for individual negotiation (Pet. 21–23). Subject to these limitations, which are not uncommon in group bargaining, petitioner authorized the Group Committee to act for it in negotiating an agreement. Accordingly, it is properly chargeable with any unlawful refusal to bargain which the Committee engaged in while acting in that capacity.[11]

(b) The Board's finding that petitioner, through the Group Committee, refused on June 20 to resume negotiations with the Union unless the Turtle Lake employees called off their strike is based on Union Representative Veleke's testimony, which the Board credited (J.A. 23; 185, 188), that, about midnight on June 19, the State mediator, who had been meeting with the Group Committee separately, relayed a message from Group Attorney Torrison that the "employer committee" would talk "if the men went back to work." Petitioner does not dispute that it is an unlawful refusal to bargain for an employer to condition further negotiations upon abandonment of a strike,[12]

[11] See *National Labor Relations Board* v. *Cement Masons Local No. 555*, 225 F. 2d 168, 173–174 (C.A. 9); *United Mine Workers* v. *Patton*, 211 F. 2d 742, 746 (C.A. 4).

[12] See *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 403–404 (C.A. 2), certiorari denied, 347 U.S. 953.

but it contends that Veleke's testimony is insufficient to establish that this occurred here because it was "hearsay" and, at best, only supports the inference that the Turtle Lake Cooperative Creamery, rather than the Group as a whole, was imposing the illegal condition (Pet. 19–20). As the testimony was admitted without objection, petitioner cannot now complain about its use by the Board.[13] Nor is there any justification for concluding that the Committee's conditional offer related only to the discussion of Turtle Lake's problems, since the last previous face-to-face bargaining between the Union and the Group Committee had involved issues common to all the employers, as did the next meeting when bargaining was resumed (pp. 4–5, *supra*); indeed, Turtle Lake signed the Group agreement, as soon as it was concluded (J.A. 30, 44; 176–181, 192).

(c) Contrary to petitioner's contention (Pet. 24–25), there was ample evidentiary support for the Board's finding that the Turtle Lake incident was at least one of the causes of the subsequent strike at petitioner's plant. Thus, the record shows that the strike at Turtle Lake was part of a Union plan to exert pressure on the members of the Group, one by one, to obtain a Group agreement (p. 4, *supra*). When, on June 20, the Group conditioned a resumption of negotiations on an illegal condition, *viz.*, call-

[13] See *Diaz* v. *United States*, 223 U.S. 442, 450; 1 Wigmore, *Evidence* § 18, pp. 321–325 (3d ed. 1940). Moreover, the mediator was apparently not available as a witness (J.A. 330), and petitioner never tendered any evidence which would contradict Veleke's testimony.

ing off the Turtle Lake strike, the Union, if it were to attain its objective, had little alternative but to intensify the pressure against the Group, and accordingly it struck petitioner. There was thus a direct causal connection between the refusal to bargain at Turtle Lake and the strike at petitioner's plant on June 22.[14] To be sure there may have been other reasons for the strike at petitioner's plant besides the June 20 unfair labor practice, but, under settled authority (see Pet. 5a–6a), these would not be sufficient to remove it from the category of an unfair labor practice strike.

3. Equally without substance is petitioner's final contention (Pet. 26–27) that it cannot be deemed to have discriminated against the strikers, since their application for reinstatement was not made in good faith but was solely for the purpose of qualifying for unemployment compensation. Both in their visit to the plant and in their subsequent letter, the strikers stated that they were ready and willing to return to work, without any conditions attached (pp. 10–12, *supra*). The mere fact that the employees may also have regarded this application as necessary to qualify them for unemployment compensation (J.A. 74–75; 315), or that they resumed their picketing after petitioner's secretary-treasurer told them to tender their application to two other officials who were not available, does not justify reading a qualification or an ulterior motive into the strikers' other-

[14] See the testimony of Union Representative Veleke quoted by the court below (Pet. 4a–5a) and note his further testimony at J.A. 187–188.

wise unequivocal offer. There is no basis for assuming that, had petitioner complied with its statutory duty to offer them reinstatement, the strikers would have rejected the jobs in favor of maintaining the picketing and perhaps receiving unemployment compensation.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

STUART ROTHMAN,
*General Counsel,*
DOMINICK L. MANOLI,
*Associate General Counsel,*
NORTON J. COME,
*Assistant General Counsel,*
NANCY M. SHERMAN,
*Attorney,*
*National Labor Relations Board.*

AUGUST 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962